In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
DEBORAH DICKINSON	)	
(Chapter 7 Case Number 00-40106)	)	Number 00-4062
	)	
Debtor	)	
	)	
	)	
	)	
CHARLES M. DICKINSON	)	
	)	
Plaintiff	)	
	)	
	)	
v.	)	
	)	
DEBORAH DICKINSON	)	
	)	
Defendant	)	

FILED
at 10 O'clock & 40 min P M
Date 4/11/01 ejc
MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

MEMORANDUM AND ORDER

FINDINGS OF FACT

Charles M. Dickinson sued the Debtor, Deborah Dickinson, his ex-wife seeking a determination that certain obligations arising out of a divorce decree are non-dischargeable under 11 U.S.C. § 523(a)(5) or (a)(15). The parties were married in 1983 and separated in 1997. On December 14, 1998, an Amended Final Order was issued by the Family Court of the Ninth Judicial Circuit of the State of South Carolina which made the following provisions for the parties that are relevant to this case.

The Court found that the wife owned a home in another state at the time of their marriage, that the couple moved to South Carolina in 1987, and that the wife had not worked outside the home in over ten years. However, the wife had previously worked as a night auditor and bookkeeper in the State of Washington, and had also worked as a civilian employee of the United States Navy in the State of Virginia. Since the divorce, she has also worked for the Office of the Clerk in Berkeley County, South Carolina, for approximately six months. Husband's income was disputed, but the Court concluded his annual income to be around $40,000.00. The Court listed the parties' marital property and awarded property in the amount of $29,650.00, including the equity in the marital residence, to the wife and marital property valued at $25,250.00, to the husband. The Court further divided the marital debt of the parties assigning the husband the obligation to repay $17,664.53, and the wife $21,690.95. The Court stated "taking both debts and assets into account, this is an approximate 50-50 division of property. Each party will be required to pay at least $150.00 per month on the above unsecured debt until the total debt for which they are responsible is satisfied." The Court awarded $750.00 per month in alimony with an additional award of $500.00 per month for one year to the wife as "rehabilitative alimony" and concluded that after a period of rehabilitation, "once wife finds suitable employment, she should be able to maintain herself comfortably with her alimony supplement." (Exhibit P-1).

The current earnings of the husband continue to be disputed by the parties,

but balancing the evidence I find that while his gross income exceeds $80,000.00 per year, after deduction of business expenses and costs of goods sold, his net income is no more than, and may be somewhat less than, the amount found by the family court judge in 1998. In fact, his 1999 tax return shows a taxable income of approximately $25,000.00 per year and although the ex-wife believes that he may often be paid in cash and may not be reporting all of his income, there was no evidence to support a finding of fact in that regard.

The wife continues to receive alimony but has not obtained gainful employment since moving to the Savannah area in 1999. She attributes her inability to find work to the fact that her former husband has caused negative information about her to be obtained by prospective employers. Debtor acknowledges that she has revealed to prospective employers that she fears her ex-husband might become violent toward her. While there is some history of domestic violence, and dispute over who was the primary or sole aggressor in any domestic violence situation, no charges were ever prosecuted against either of the parties. In addition, the wife acknowledged receiving some financial assistance, which supplements her alimony income, from friends and family amounting to approximately $2,500.00 per year.

CONCLUSIONS OF LAW

11 U.S.C. § 523(a)(5) and (15) provide as follows:

(a) A discharge under section 727, 1141, 1228(a), or 1328(b) of this title does not discharge an individual debtor from any debt–

(5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that–

(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless–

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Upon review of the facts in this case I conclude that this debt is not

actually in the nature of support and subsection (a)(5) is inapplicable. It is quite apparent from reading the terms of the Court's Order which is in issue that a conscious decision was made by the Court to divide the assets and liabilities of the parties right down the middle. The Court awarded slightly more than fifty percent of the assets to the wife, including the approximate $19,000.00 in equity in the marital home, but at the same time assigned a slightly larger proportion of the debt to her as well. The Court recognized that the wife had no current work history, but obviously contemplated that she would return to work after a twelve month period of emotional rehabilitation. Nonetheless, based on the disparity in the parties' income and the husband's work history, there is nothing to suggest that the assignment of the debts as the obligation of the wife was intended as being actually in the nature of alimony to the husband, but rather represented that Court's well-balanced efforts to divide the assets and liabilities of the parties in a pure property division. Accordingly, the analysis of the dischargeability of this obligation will proceed under Section 523(a)(15).

The burden of proof in establishing the Section 523(a)(5) or (a)(15) exception is on the non-debtor spouse. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). However, although exceptions from discharge are normally construed strictly against the objecting creditor in order to provide the debtor with a "fresh start," *see* In re St. Laurent II, 991 F.2d 672, 680 (11th Cir. 1993), policy considerations require a bankruptcy court to construe domestic relations exceptions more liberally. In re Kline, 65

F.3d 749, 751 (8th Cir. 1995); In re Miller, 55 F.3d 1487, 1489 (10th Cir. 1995), *cert. denied*, 516 U.S. 916, 116 S.Ct. 305, 133 L.Ed.2d 210 (1995).

Section 523(a)(15) renders all debts arising from a divorce or separation agreement or a decree *prima facie* non-dischargeable. Matter of Cleveland, 198 B.R. 394, 397 (Bankr. N.D. Ga. 1996). Under Section 523(a)(5), the non-debtor spouse must show that the obligation in issue is actually in the nature of support; however, under Section 523(a)(15), the non-debtor spouse must only show that the debt was incurred during the course of a divorce or separation. *See* In re Stone, 199 B.R. 753 (Bankr. N.D.Ala. 1996). If this burden is met, the burden of going forward shifts to the debtor to either rebut the evidence that the provision is actually in the nature of support under Section 523(a)(5) or offer a prima facie case in support of either exception under Section 523(a)(15). Id. at 783; In re Gantz, 192 B.R. 932, 936 (Bankr. N.D. Ill. 1996); In re Anthony, 190 B.R. 429, 432 (Bankr. N.D. Ala. 1995). The ultimate burden remains with the creditor seeking to except the debt from discharge. *See* In re Stone, 199 B.R. at 783. The relevant time for making the Section (a)(5) analysis is the time of the decree, In re Harrell, 754 F.2d 902 (11th Cir. 1985), and the Section (a)(15) analysis is the date of the trial in bankruptcy. *See* In re Dressler, 194 B.R. 290 (Bankr. D. R. I. 1996); In re Morris, 193 B.R. 949, 952 (Bankr. S.D. Cal. 1996). *Cf.* In re Walford, Adv. Pro. No. 97-01026A (Bankr. S.D. Ga. Aug. 29, 1997), (Dalis, C.J.)(holding that relevant time is at bankruptcy petition date, but does not preclude consideration of disposable income at time of trial).

An obligation arising from a division of property may be discharged if a debtor can demonstrate that she does not have the ability to pay such debt due to other reasonably necessary expenses. In these instances, courts have adopted a twofold analysis. First using the disposable income test, a court must determine "whether the debtor's budgeted expenses are reasonably necessary." In re Hill, 184 B.R. 750, 755 (Bankr. N.D. Ill. 1995). Second, Section 523(a)(15)(A) requires a court to consider a debtor's "ability to pay." 11 U.S.C. § 523(a)(15). In that regard, a court must view the debtor's general "ability to pay" and not permit the debtor to rely on a "snapshot" of his financial abilities at the time of filing. *See* In re Smither, 194 B.R. 102, 107 (Bankr. W.D. Ky. 1996)(holding that court must consider prospective earning capacity rather than a snapshot); In re Anthony, 190 B.R. 433 (Bankr. N.D. Ala. 1995). Factors affecting the ability to pay include:

(1) disposable income at the time of the trial;

(2) presence of more lucrative employment opportunities;

(3) any relief of debt expected in short term; and

(4) the extent to which the debtor has made a good faith attempt to obtain employment to satisfy the debt.

In re Walford, Adv. Pro. No. 97-01026A (Bankr. S.D. Ga. Aug. 29, 1997). If, after excluding expenses reasonably incurred, a court determines that a debtor does not have the

"ability to pay," the debt is discharged. If the debtor has the "ability to pay," she still may attempt to discharge the debt pursuant to Section 523(a)(15)(B).

Under Section 523(a)(15)(B), a debtor may discharge the obligation if it is demonstrated that the benefit of a discharge outweighs the detrimental consequences to the objecting party. This section essentially requires a court to "balance the equities" by considering a number of factors, including income and expenses of both parties; whether the non-debtor spouse is jointly liable on the debts; the number of dependents; the nature of the debts; the reaffirmation of any debts; and the non-debtor spouse's ability to pay. *See* In re Hill, 184 B.R. at 756; *see also* In re Adams, 200 B.R. 630 (N.D. Ill. 1996); Taylor v. Taylor, 199 B.R. 37, 41 (N.D. Ill. 1996); In re Custer, 208 B.R. 675, 682 (Bankr. N.D. Ohio 1997); In re Cleveland, 198 B.R. 394, 400 (Bankr. N.D. Ga. 1996); In re Smither, 194 B.R. at 110-11.

The debt obviously arises out of a divorce decree so its presumed to be nondischargeable under 523(a)(15) unless the debtor establishes a defense by the preponderance of the evidence. I conclude that she has failed to establish either a lack of ability to pay or that discharge of the debt will result in a benefit to her that outweighs the detriment to her former spouse. In terms of ability to pay the current income of the parties is taken into account. Given the taxable income of the husband in 1999, the most recent year available, his income amounted to $25,000 for the year less the $9,000 in alimony that

he is paying the debtor. Her income on the other hand is the $9,000 alimony payment coupled with the approximate $2,500 in assistance she has received from friends and family. Moreover, the Court must consider her work history when determining her ability to pay and I conclude that she has not been able to establish by a preponderance of the evidence that she has a continuing inability given her age, education, experience, and training to become gainfully employed and to earn sufficient income out of which she could pay this obligation.

Finally, the additional benefit she would receive by discharging this marital property division obligation does not outweigh the detriment to her former spouse. The former spouse's uncontradicted testimony indicated that he owes over $70,000.00 in debt including the obligations he was ordered to pay by the domestic relations court and the approximately $21,000.00 in debt that the wife was ordered to pay, but on which he remains obligated as an original obligor. The addition of the $21,000.00 in marital debt, designated by the South Carolina Court order to be paid for by the Debtor, to the former spouse's current debt, would render an inequitable result in this case, especially as the former spouse is still making alimony payments to the Debtor. In this case, the benefit to the Debtor does not outweigh the detriment to the former spouse.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS

THE ORDER OF THIS COURT that Debtor's obligation to pay the obligations imposed on her by the domestic relations order are non-dischargeable. Judgment will be entered in favor of the Plaintiff in the amount of $21,690.95, plus interest from the date of the domestic relations decree.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 10th day of April, 2001.